Supreme Court of Kentucky

CASE NO. 2015-SC-000575-D
(2015-CA-000328)
ON REVIEW FROM
THE COURT OF APPEALS

MAGOFFIN COUNTY BOARD OF ELECTIONS, ET AL. — APPELLANTS

v.

MAGOFFIN CIRCUIT COURT
2014-CI-00371

JOHN MONTGOMERY, ET AL. — APPELLEES

BRIEF OF MAGOFFIN COUNTY BOARD OF ELECTIONS

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CERTIFICATE OF SERVICE

I certify that on March 7, 2016, I served ten copies of this Brief of Magoffin County Board of Elections Appellants via Federal Express overnight delivery to Susan Stokely Clary, Clerk, Kentucky Supreme Court, Room 209, Capitol Building, 700 Capital Avenue, Frankfort, Kentucky 40601; and one copy via U.S. Mail, postage pre-paid, to Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Honorable John Preston, Johnson County Judicial Center, 908 Third St., Suite 217, Paintsville, KY 41240; Gordon B. Long, Gordon B. Long Law Office, P.S.C., P.O. Box 531, Salyersville, KY 41465; James Deckard, HURT, DECKARD & MAY, PLLC, 127 West Main Street, Lexington, KY 40507; and Eldred E. Adams, Jr., Attorney At Law, 110 East Main Street, P.O. Box 606, Louisa, KY 41230.

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INTRODUCTION

This is an appeal from an Opinion of the Court of Appeals affirming a Judgment of the Magoffin Circuit Court setting aside an election for alleged violations of KRS Chapter 117 and the Corrupt Practices Act. The underlying case was an election contest brought by Appellee John Montgomery pursuant to KRS 120.155 to challenge the election of Appellant Dr. Charles Hardin in the 2014 general election for Magoffin County Judge/Executive. This brief is submitted by the Magoffin County Board of Elections, Renee Arnett-Shepherd, as Magoffin County Clerk, and Carson Montgomery, Susie Salyer, and Justin Williams, in their official capacities as members of the Magoffin County Board of Elections (collectively referred to as the "Magoffin County Board of Elections").

STATEMENT CONCERNING ORAL ARGUMENT

On February 24, 2016, the Chief Justice of the Commonwealth of Kentucky, John D. Minton, scheduled oral argument in this matter for April 27 at 11:00 a.m.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Thirty days after the November 4, 2014, general election, on the final day allowed by statute, John Montgomery filed an election contest challenging the results of the election in which Dr. Charles Hardin was re-elected Magoffin County Judge/Executive. In his Verified Petition, Mr. Montgomery alleged that there were various irregularities in 12 of the county's 14 precincts[1]; that the Board of Elections provided absentee ballots to dead or ineligible voters[2]; that the Board of Elections allowed non-residents to vote[3]; and that Dr. Hardin exchanged consideration, such as paving work, graveling, and cash, for votes.[4] As will be explained more below, Mr. Montgomery did not present any evidence of any dead or ineligible voter who was allowed to cast an absentee ballot, and he did not allege that any non-resident was allowed to vote.

Over the objection of the Board of Elections and Dr. Hardin that Mr. Montgomery was required to present his case-in-chief within 30 days of serving the summons (the last of which was served on December 14), the trial was scheduled for February 2, 2015, and discovery commenced. At Mr. Montgomery's deposition, counsel for the Board of Elections asked him to name any dead or ineligible persons who voted. Mr. Montgomery could only name E.J. Rudd as a person who had died prior to the election but nevertheless had his vote counted. Mr. Montgomery could not name any other dead or ineligible voters. But, like Mark Twain's, reports of Mr. Rudd's death have been greatly

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[1] *See* Appendix C, Verified Petition, Counts I – XII.

[2] *Id.* at Count XIII. The only person Montgomery identified in his deposition as being dead was alive both at the time of the election and during the trial.

[3] *Id.* at Count XIV. This allegation was discarded, as no proof was entered related to this allegation.

[4] *Id.* at Counts XV. The Board of Elections takes no position on the allegations made against Dr. Hardin for exchanging consideration for votes because it has no legal interest in that matter.

exaggerated. He is as alive today as he was on election day. This is critically important, especially since this was the single instance Mr. Montgomery had that supported his Verified Petition to which he swore under oath.

Undaunted by a lack of evidence, Mr. Montgomery submitted his witness list on January 10, three weeks before trial, specifically naming 97 people and generically listing all 10,004 registered voters as witnesses.[5] Mr. Montgomery also listed as a witness a handwriting expert, Mr. Thomas Vastrick. However, it was not until January 13, 2015, that Mr. Montgomery's counsel produced Mr. Vastrick's report, dated December 31, 2014, in which Mr. Vastrick had compared signatures on voter identification cards to those on the precinct rosters. Mr. Montgomery's exhibit list was just as vague and overbroad as his witness list; in it, he listed "[a]ny document or other tangible items obtained prior to the completion of the contestant's evidence-in-chief."[6]

Sensing that Mr. Montgomery planned to ambush them or to reimagine his case, the Board of Elections asked the Circuit Court to bar any witness not named on the witness list and any exhibit not produced.[7] In their motion the Board of Elections noted:

> We are less than 20 days from trial at the time of filing of this Motion. . . Even at this late date Petitioner has not supported his very serious allegations. Yet he continues to fish. Respondents are entitled—at the very least—to know what case they are defending. Not only has Petitioner attempted to hide the ball, Respondents don't even know what sport Petitioner has haled them into court to play.[8]

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[5] *See* Respondents' Joint Motion to Exclude Portions of Petitioner's Witness List and Exhibits List.

[6] *Id.* at ¶14.

[7] *Id.*

[8] *Id.* at 7.

The Board of Elections' fears were substantiated when Mr. Montgomery filed a motion for summary judgment based on technical violations of statutes related to absentee ballots, a ground which he had neither pleaded nor previously argued.[9] The trial court denied the motion on January 30, 2015, the Friday before the Monday that trial was to begin.[10] That same day Mr. Montgomery produced two new reports from his handwriting expert, alleging, for the first time, that various signatures on absentee ballots may not have been signed by the same person who applied for the absentee ballot. Thus, mere days before trial, Mr. Montgomery cut bait on the allegations in his Verified Petition (*i.e.,* that dead persons and other ineligible persons were allowed to vote) and recast, asserting entirely new grounds absent from his Verified Petition.

At trial[11], Mr. Montgomery submitted evidence regarding various aspects of the absentee ballot process, none of which concerned dead or ineligible voters.[12] The trial court relied on that evidence and those grounds in declaring that the election should be set aside, and the Court of Appeals noted that absentee voting was the "central issue" and that the "significance of the absentee voting in this case cannot be understated."[13] Yet it was never pleaded. And it was not brought up until mere days before trial.

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[9] *Compare* Mr. Montgomery's Motion for Summary Judgment (filed January 22, 2015 six business days before trial) *with* Verified Petition, Count XIII.

[10] *See* Order Denying Plaintiff's Motion for Summary Judgment, entered on January 30, 2015.

[11] Montgomery called 27 witnesses and Appellants called 10 at trial. Due to the length of the trial testimony, the Board of Elections limits its discussion to those aspects of the testimony related to the Court's finding of error on the part of the Board of Elections.

[12] The Board of Elections objected to that proof on the ground that it was not pleaded. *See* VR 9:43:45 to 9:47:32 on February 2, 2015.

[13] *See* Appendix A, Court of Appeals opinion at 10.

Specifically with regard to the absentee voting there are three issues: the application process, in-house absentee voting, and the counting of the absentee ballots.

Concerning the application process, the Court of Appeals ruled the Board of Elections violated KRS 117.085(2), which requires an applicant for a mail-in absentee ballot to inform the Board of Elections where the person is going to be on election day.[14] Although he knew the names of all such individual applicants for which that information was missing, Mr. Montgomery did not call any of them to testify. Further, County Clerk Renee Shepherd explained that the VRS computer program provided by the Kentucky State Board of Elections does not require this information in order for an application to be printed.[15] Some fields in the computer program are mandatory, such as a person's name, address, and the reason they need to vote absentee, meaning that no application can be printed without that information. All of that information was present on each application.

As noted above, Mr. Montgomery also raised issues related to signatures, but his handwriting expert, Mr. Vastrick, was thoroughly discredited when he admitted that he could not say that even one of the signatures was not signed by the actual voter. Incredibly, he testified, "I'm not saying person A did or person A did not do a specific signature."[16] He said this was because, among other reasons, Mr. Montgomery did not provide him enough signature specimens to compare; he, rather, used a one-to-one comparison that even he admitted was insufficient to the task.

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[14] *Id.* at 12.

[15] The trial court erroneously stated that Ms. Shepherd testified that the system would reject a voter's request if it did not say where the voter would be on election day. Judgment at ¶ 4. Actually, Ms. Shepherd testified to the opposite. *See* VR at 10:58:16 to 10:58:36 on Feb. 2, 2015.

[16] VR 10:22:17 to 10:22:30 on February 3, 2015. Mr. Vastrick also said there were "significant limitations" in his review." VR 10:18:30.

A very interesting side note related to Mr. Vastrick's unreliable report and one that highlights the importance of calling the person to the stand who a contestant feels voted illegally is the story of two of Mr. Montgomery's own witnesses that appeared on Mr. Vastrick's list of potentially forged signatures, who Mr. Montgomery called for other reasons. Each of these witnesses testified that he or she personally signed the documents in question. One of the two, Stacy Russell, explained that he had recently injured his left hand, disabling him from writing with his natural hand.[17] The other witness, Stephanie Montgomery, is Mr. Montgomery's niece and was very surprised to learn that she was on a list of persons who were accused by Mr. Montgomery as someone who may have engaged in voter fraud. She also testified that she signed the voter registration card and the precinct roster. Understandably, neither the trial court nor the Court of Appeals relied on Mr. Vastrick's testimony to discard any votes.

In-house absentee voting started on October 20, 2014, in an area of the county clerk's office set away from where the public has access, as is required by law. The entire process - except for the person's actual vote - was overseen by Republican and Democrat challengers, members of the Board of Elections, and county clerk employees. Mr. Montgomery introduced evidence that "at least four voters" were assisted by a deputy county clerk or the Democrat member of the Board of Elections without another person present. He did not call any of these voters to testify, even though their identities and contact information were readily available. In fact, Mr. Montgomery did not submit *any* evidence of misconduct or improprieties related to any of those voters . . . or any other. The Republican challenger, Garlena Workman, who was present at the in-house

[17] *See* Appendix C, Findings of Fact, Conclusions of Law, and Judgment, at 19 ¶16.

voting the entire time, did not see anything untoward, and thought that the process was fair and honorable.[18] Ms. Workman testified that she would have stopped any misconduct if she saw it.[19] Also present were the Democrat challenger, Jerry Helton, County Clerk Renee Shepherd, and Republican member of the Board of Elections Justin Williams. Each person testified that nothing inappropriate occurred at all during the in-house absentee balloting. The Court of Appeals ruled that these technical violations were alone not enough to invalidate the absentee process.[20]

Before proceeding to the tabulation of the absentee ballots, a brief word about Pastor Justin Williams is in order. Pastor Williams became the Republican member of the Board of Elections on the first Friday of the in-house absentee voting.[21] The previous Republican member of the Board of Elections abruptly resigned the previous Friday.[22] The chair of the Magoffin County Republican Party submitted names to the Kentucky Secretary of State on October 22, and Pastor Williams was promptly appointed on October 23, fewer than four business days from when his predecessor resigned.[23] Prior to his appointment, Pastor Williams led a group of Magoffin County pastors to teach that Christians should not engage in election fraud.[24] The pastors' statement was placed in the Salyersville Independent newspaper, and the group of pastors asked all candidates to

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[18] *Id.* at p. 40; VR 11:50:39 on February 9, 2015.

[19] VR at 11:46:36.

[20] *See* Appendix A, Court of Appeals' opinion at 16.

[21] *See* Appendix C, Findings of Fact, Conclusions of Law, and Judgment, at 41-42.

[22] *Id.*

[23] VR 1:21:33 to 1:21:55 on February 9, 2015.

[24] *See* Appendix C, Findings of Fact, Conclusions of Law, and Judgment, at 41-42.

sign a pledge to not engage in election fraud.[25] Pastor Williams testified that he took his appointment to the Board of Elections very seriously, that he actively sought out misconduct (though he did not find any), and that he even went so far as to ensure that no person had a writing utensil in the room where the absentee ballots were to be counted.[26]

Now to the counting of the absentee ballots. The Court of Appeals found that the "deviations from the statutory procedure for counting the absentee ballots were . . . significant."[27] The Court of Appeals identified as these allegedly significant derivations "failing to count the ballots one at a time, . . . attempting to randomize the ballots by shuffling them on the table, and . . . distributing the ballots among the various officials present."[28] As to those points, County Clerk Renee Shepherd, Pastor Williams, and Susie Salyer each explained that they worked together to go through the absentee ballots in order to ensure that their count was completed before the polls closed at 6:00 p.m. and to combat against allegations of misconduct. Each of them also testified that they could at all times see everything that was going on in the room and that nothing inappropriate occurred.

It should not go without mention that in order for there to be election fraud, every person on the Board of Elections would have had to play a role. This is so because, among other things, the ballot box that housed the absentee ballots contained three locks: one for Pastor Williams, one for Mrs. Salyer, and one for Deputy Sheriff Lisa

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[25] *Id.*

[26] *Id.* at 43.

[27] *See* Appendix A, Court of Appeals' opinion at 21.

[28] *Id.* at 21.

Montgomery.[29] Once the box was opened, it remained in the sight of all of the people in the room, including, but not limited to, the members of the Board of Elections. Two candidates and a representative of a third candidate were also present and oversaw the counting of the absentee ballots. There was no evidence that any technical violation affected the fairness or accuracy of the election. The evidence is to the contrary. To wit, Pastor Williams testified that the Board of Elections randomized the ballots on the table because it would have been impossible to physically shuffle them in the ballot box due to its weight, and that each member participated in the counting and review of the absentee ballots to improve the work and *to infuse more integrity* into the process. He testified: "The integrity of the vote would be better maintained if everyone there had a part in the process."[30]

As noted above, the Court of Appeals affirmed the trial court in a split decision. The majority failed to address the Board of Elections' contentions that Mr. Montgomery tried a case that he did not plead, which should have led the Court of Appeals to reverse the judgment. And it was the unpleaded issue of the absentee balloting process that the Court of Appeals labeled the "central" issue in the case that "cannot be understated"[31] and upon which it based its affirmance. Even though the Court of Appeals found the absentee-voting issues "central" to the case, it also stated that if "[t]aken separately, [the Court] might be inclined to find that the Board substantially complied with the statutory requirements. But viewed together, they present a highly troubling picture of the Board's

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[29] *Id.* at 38.

[30] Testimony of Justin Williams on February 9, 2015, at VR 1:40:30 to 1:41:05.

[31] *Id.* at 10.

non-compliance with the statutory process."[32] This even though Mr. Montgomery did not produce a shred of evidence that these technical violations—either in their singular or collective—impacted the election at all. He knew their names and had their contact information. Yet he elected not to call them as witnesses.

The dissenting opinion, written by Judge Kelly Thompson, would have reversed because the evidence was "woefully short of that required" to overturn an election.[33] As the Board of Elections has conceded, and as exists in every election, the dissent found that there were minor, inconsequential deviations from the statutory requirements. After considering the evidence—or lack thereof—the dissent noted that it believed that the "deviations from the statute were necessary to timely count the ballots and the applicable provisions directory in nature."[34] Speaking of the supposedly "central" issue that the majority found warranted setting aside the election, the dissent stated: "It seems absurd to me that this election is being voided because ballots were not shaken in a box and not individually counted by the Clerk."[35] The dissent recognized that there was no evidence that the process was unfair or that the election was not administered in good faith.[36] Finally, it concluded:

> Contrary to the stated law, this election has been voided based on speculation and suspicions. Perhaps, the seeds of these suspicions are planted from what the majority considers a history of election misconduct in Magoffin County. I do not attempt to contradict the majority's

[32] *See* Appendix A, Court of Appeals' opinion at 20.

[33] *Id.* at 27.

[34] *Id.* at 41.

[35] *Id.*

[36] *Id.* at 42.

> historical account. Regardless of the sins of past candidates and election officials, we are required to decide the fate of this election based on the facts presented, or more importantly, those not presented.[37]

The trial court entered its Judgment setting aside the election on February 20, 2015. The Court of Appeals affirmed that decision on June 15, 2015. This Court granted discretionary review on February 10, 2016.

ARGUMENT

I. MR. MONTGOMERY FAILED TO PLEAD THE GROUNDS ON WHICH HE RELIED.

Both the Circuit Court and the Court of Appeals based their determinations that the election should be set aside on the grounds that there were irregularities with the absentee ballot process.[38] However, those were grounds that John Montgomery failed to adequately raise in his petition. In fact, Mr. Montgomery raised those issues for the first time in a summary judgment motion filed a mere eleven calendar days before the trial on this matter – a trial inappropriately delayed by the Circuit Court to provide Mr. Montgomery the opportunity to go on a fishing expedition after he was unable to find evidence to support the actual allegations in his petition. The Circuit Court's and the Court of Appeals' consideration, indeed reliance upon, grounds not actually pleaded to overturn an election was not only unfair to Appellees, but violated the statutory requirement in KRS 120.155 stating that a petition contesting an election state the grounds of the contest relied on, and forbidding a contestant from relying on any grounds

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[37] *Id.* at 42.

[38] *See* Appendix A, Court of Appeals' opinion at 10, 24.

not so stated. For this reason alone, the decisions of the Circuit Court and Court of Appeals should be reversed.

It has long been held by Kentucky's high court that courts have no inherent power to try contested elections. *Wilson v. Town of Whitley*, 166 S.W. 775, 776 (Ky. 1914). "The right to contest elections is purely statutory," and the procedural dictates of the statutes are mandatory. *Gross v. Ball*, 81 S.W.2d 409, 411 (Ky. 1935); *see Calvin v. Mills*, 284 S.W. 115, 115 (Ky. 1926) (statutory time for filing petition is jurisdictional); *Clark v. Mason*, 596 S.W.2d 16, 17 (Ky. App. 1979) (statutory time for filing pleadings and taking proof should be "strictly enforced"). Pursuant to KRS 120.155, a candidate may contest an election within 30 days of the election. The petition must "state the ground of the contest relied on, and no other grounds shall afterwards be relied upon." KRS 120.155. After the petition has been filed and the summons returned, "[t]he judge shall proceed to a trial of the cause without delay." KRS 120.165(1). In particular, "[t]he evidence in chief for the contestant shall be completed within thirty (30) days after service of summons . . . provided that for cause the court may grant a reasonable extension of time to either party." KRS 120.165(2).

The public policy is clear: "It was the purpose and intent of the Legislature . . . that election contests should be promptly initiate and speedily heard and determined, and to this end it was necessary, and the lawmakers recognized the necessity, that the issues should be definitely made within the time provided, and that no grounds other than those relied on in the pleadings should afterward be asserted." *Gross v. Ball*, 81 S.W.2d at 411; *see Clark v. Mason*, 596 S.W.2d at 17 (KRS 120.155 "could not be more clear in pointing out the importance of quick decision-making in an election contest"). The election

statutes simply do not provide for "fishing expedition[s]" for the losing party in an election to cast about seeking grounds to assail the election. *See Watts v. Fugate*, 442 S.W.2d 569, 574 (Ky. 1969).

Nearly every one of the statutory dictates regarding the procedure for contesting an election was ignored by Mr. Montgomery and the Circuit Court, resulting in the precise "[f]ishing expedition" and subsequent trial on grounds not raised in the petition that the Kentucky Revised Statutes forbid. Indeed, while Mr. Montgomery filed his petition timely – albeit on the very last possible day – all other requirements cited above were ignored.

For instance, the last summons was served in the case on December 16, 2014, meaning that under KRS 120.165(2), Mr. Montgomery's case in chief had to be completed by no later than January 15, 2016.[39] Yet the Circuit Court set the trial to begin on February 2, 2015. In doing so, the Circuit Court made no finding of just cause for an extension of time.[40] The failure to make such a finding rendered the Circuit Court's order entirely inappropriate.

This is amply demonstrated by the decision in *Clark v. Mason*. There, the contestant filed a petition on November 17 and the summons was served shortly thereafter. 596 S.W.2d at 16-17. On December 15, the court set a trial date of December 28. The respondent objected on the ground that the trial court would not hear the proof of the case within the statutory 30-day period. *Id.* at 17. The trial court overruled the

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[39] The first appellant served was Susie Salyer, who was served on December 6, 2014. Arguably, that was the date that started the 30 day statutory limitation running. But this issue need not be decided since even using the date of service of the last respondent, Mr. Montgomery's presentation of his case in chief was outside the time limitations in the statute.

[40] *See* Order entered on December 22, 2014, at 2.

motion and never made a finding of just cause for an extension of time beyond the statutory limitation. *Id.* Finding error with the trial court's failure to make a just cause determination, the Court of Appeals ordered the judgment reversed and the petition dismissed. *Id.*

The Circuit Court's decision in this case only served to provide an opportunity for Mr. Montgomery to go on a fishing expedition to attempt to save a case that, as pled, failed miserably. Indeed, the petition raised as grounds that dead or ineligible voters were permitted to vote via the absentee process. Unfortunately for Mr. Montgomery, neither of those grounds was supported by actual proof. In fact, at his deposition, when Mr. Montgomery was asked to identify dead people who voted absentee (since he had alleged that it occurred in his Verified Petition), he could only identify one individual who is actually still alive. He simply had no basis for the allegations in his Verified Petition, which he swore to under oath.

Thus, rather than rest on those allegations for which he had no proof, Mr. Montgomery used the extra time inappropriately granted him by the Court to forage for new issues. In particular, Mr. Montgomery focused his attention on supposed "irregularities" in various aspects of the absentee balloting process. Indeed, six business days prior to trial, Mr. Montgomery filed a motion for summary judgment predicated on such grounds. After that was denied, Mr. Montgomery relied upon those new-found grounds at trial, the Circuit Court relied upon those new-found grounds in finding that the election should be overturned, and the Court of Appeals' majority relied upon those new-found grounds in concluding that the Circuit Court's judgment should be affirmed.

But because those new-found grounds had not been adequately pled, the Circuit Court should have forbidden Mr. Montgomery from relying upon them. Indeed, in his Verified Petition, all Mr. Montgomery stated about absentee voting were the following allegations from Count XIII:

> 69. Upon information and belief, before and during the November 4, 2014 elections, election officials in all precincts across Magoffin County violated KRS 117.075-.088 by providing absentee ballots to people ineligible to vote, counting ballots of persons who had died, and other irregularities affecting the fairness and equality of the election.
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> 70. The Attorney General of the Commonwealth of Kentucky, "having reason to believe that the election laws . . . have been violated" has subpoenaed all absentee ballots associated with the November 5, 2014 election. . . .
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> 71. The absentee votes in violation of KRS 117.075-.088 and other votes cast in violation of election laws cannot be case for Charles Hardin, M.D. and cannot be counted because they suffer from more than mere irregularities and affect the fairness and equality of the election.

As is obvious, nothing in those allegations mentions any failures to include certain information on absentee ballot applications. Nothing mentions that in-house absentee voting was conducted incorrectly. And nothing mentions that the absentee ballots were counted incorrectly, by being shuffled on a table rather than in a box or by being handled by the whole of the Board of Elections rather than just the County Clerk.

Of course, Mr. Montgomery's vague references in his petition to KRS 117.075-.088 and to "other irregularities affecting the fairness and equality of the election" can hardly be sufficient for Mr. Montgomery to have met the requirement that he state the grounds upon which he relied in his contest. After all, KRS 117.075-.088 encompasses

no less than ten separate statutes. And many of those statutes are lengthy and comprised of numerous subsections and further divisions. For instance, KRS 117.085, by itself, comprises more than five single-spaced pages. That statute is sub-divided into numbers (1) through (10). Sub-division (1) is further sub-divided into subdivisions (a) through (i). And subdivision (1)(a) is even further sub-divided into paragraphs 1 through 8, while (1)(e) is sub-divided into paragraphs 1 through 6. Simply put, a vague and unexplained reference to ten different statutes, themselves comprising numerous requirements, cannot possibly meet the requirement of KRS 120.155 that a contestant "state the grounds of the contest relied on, and no other grounds shall afterwards be relied upon." Such minimal pleading fails to provide any true notice of the nature of the claims.

Indeed, a holding to the contrary would defeat the well-settled policies behind KRS 120.155. If election contests can proceed based on vague references to numerous statutes, all election contestants would be well-served by including in their petitions such vague references to ***all*** election-related statutes. This would leave respondents to such contests with little idea of the actual case they are defending – and in a situation where the trial of that case is supposed to be underway less than 30 days after the respondents have been served with a summons. That is what happened here. Certainly, this was not what the Legislature envisioned when it imposed the statutory requirements that the grounds of the contest be stated, that the grounds not be amended, and that the trial proceed within 30 days of service of the summons. Instead, it would only serve to countenance the type of "fishing expedition[s]" for a losing party in an election that Kentucky's high court has recognized are inappropriate. *See Watts v. Fugate*, 442 S.W.2d at 574.

A comparison of the allegations in Mr. Montgomery's petition with those that courts have found sufficient in other petitions demonstrates just how vague and useless Mr. Montgomery's allegations were. For instance, in *Upton v. Knuckles*, the Court of Appeals was faced with the question of whether a complaint was sufficient. The complaint alleged that KRS 118.330(1), (2), (3), and (4) were violated by "[a]llowing unauthorized and illegal persons to be inside the polling place during balloting"; "allowing Election Officers to electioneer within the polls during balloting"; "allowing unauthorized and illegal personnel to electioneer inside the polling place during the balloting"; and "allowing unauthorized persons to converse with others concerning their support or non-support of candidates inside the polls during balloting." 470 S.W.2d 822, 826 (Ky. 1971). It further alleged that KRS 125.140(2) was violated because "[a] great number of persons were allowed to be assisted in voting without making an oath as to the disability of each" and "a great number of persons were allowed into the mechanical voting machine accompanied by one person, when the law required first the oath and accompaniment of the two election judges." *Id.* Finding the complaint sufficiently specific, the Court of Appeals noted that it squarely alleged violations of elections so extensive that the election should be void and "***[t]he kinds of violations are set forth.***" *Id.* at 827.

Mr. Montgomery's petition, at least as it relates to the supposed irregularities in absentee voting upon which he ultimately hung his hat, stands in stark contrast to the complaint in *Upton*. Whereas the complaint in *Upton* cited particular subsections of single statutes, Mr. Montgomery cited generally to ten separate statutes, with nary a citation to a particular subsection within those. And whereas the complaint in *Upton*

alleged specific facts as to how the statutes were violated – *e.g.*, by "allowing Election Officers to electioneer within the polls during balloting" – Mr. Montgomery's petition contained no such allegations (excepting the ones regarding "ineligible" and "dead" voters for which he was unable to adduce any proof at trial).

Simply put, Mr. Montgomery pled one case, found it to be falling apart, and switched to another. He was provided the opportunity to do so when he requested, and received, permission to try his case beyond the jurisdictional statutory time limit for doing so, despite that the Circuit Court never made a finding of good cause for such an extension. And that second case focused on (immaterial and technical) alleged violations of particular aspects of particular statutes relating to absentee voting. Mr. Montgomery failed to plead those alleged violations in a way that could ever reasonably be said to have provided notice to Appellants of his claims. Yet, those were the grounds upon which Mr. Montgomery relied, the grounds upon which the Circuit Court rendered its judgment, and the grounds upon which the majority at the Court of Appeals based its finding that the Circuit Court's judgment should be affirmed. This Court should thus reverse.

II. THERE WAS NO EVIDENCE OF "FLAGRANT, EXTENSIVE, AND CORRUPT VIOLATIONS" OF ELECTION STATUTES

Disenfranchising voters and overturning elections is an extreme measure only to be used when there are "flagrant, extensive, and corrupt violations" of the election statutes of such a magnitude so as to effectively "destroy any hope that results as tabulated [would be] a fair indication of the sense of the voters." *Upton*, 470 S.W.2d at 827. "It is a rule of practically universal application that an election will not be invalidated or voters deprived of their right of suffrage by mere irregularities which do

not affect the fairness and equality of the election." *Harmon v. Wilson*, 254 S.W.2d 693, 694 (Ky. 1953). As Kentucky appellate courts have recognized, carrying out the absentee-ballot process is difficult. *Hale v. Goble*, 356 S.W.2d 33, 35 (Ky. 1961) ("To say the least, the absentee voting law is difficult to administer."). For that reason, Kentucky courts have insisted that substantial compliance suffices. *See, e.g.*, *Stabile v. Osborne*, 217 S.W.2d 980, 982 (Ky. 1949) ("substantial compliance is sufficient if the proper ends are reached"); *Jarboe v. Smith*, 350 S.W.2d 490, 493 (Ky. 1961) ("Through all the cases relating to absentee voting, the theme of *substantial compliance* with statutory regulations is omnipresent." (emphasis in original)). Technical violations of election statutes are insufficient. *Id.* Indeed, even if a violation was more than technical, the evidence must show a "molestation or alteration of the ballots" before an election will be set aside. *See Ward v. Salyer*, 140 S.W.2d 1016, 1020 (Ky. 1940); *see also Jarboe*, 350 S.W.2d at 493.

Simply put, the crucial question is whether a violation strikes at the heart of the election and "destroy[s] the fairness and equality of [it]." *Upton*, 470 S.W.2d at 827. And, in an election contest, the burden falls squarely on the contestant to clearly demonstrate that. In *Skain v. Milward*, the Court of Appeals explained:

> The burden of proof is on the contestant to show such fraud, intimidation, bribery, or violence in the conduct of the election that neither the contestant nor contestee can be adjudges to have been fairly elected. ***These things are not presumed, but it must be affirmatively shown, not only that they existed, but that they affected the result to such an extent that it cannot be reasonably determined who was elected.***

127 S.W. 773, 778 (Ky. 1910) (emphasis added). Indeed, the evidence must point "unerringly" to the establishment of the invalidating facts before courts should declare an

election void. *Hall v. Martin*, 208 S.W.417 (Ky. 1919). Here, there is not even a hint that the absentee voting process was infected with fraud or was affected by any supposed statutory violations, much less was "unerring" evidence presented.

A. The absentee ballot application process substantially complied with the statutes.

Both the Circuit Court and the Court of Appeals found issue with the applications for mail-in absentee ballots. In particular, the courts found that the County Clerk violated election laws by issuing ballots where the applications failed to state one or more of the following: the voter's Social Security number and/or telephone number; the location where the voter would be on Election Day; or the name of the person requesting the application for the voter. However, these were, at most, technical statutory violations, and in the case of the supposedly missing Social Security numbers, not even that. Even more importantly, these violations have little to do with the real issue at stake: whether the voters who voted absentee were qualified to do so and whether the voting was infected by fraud. On those points, despite having had the opportunity to conduct a fishing expedition beyond that envisioned by the statutes regulating election contests, Mr. Montgomery was unable to provide any evidence.

The relevant statute is KRS 117.085(2), which provides:

> The absentee ballot on the application form shall be in the form prescribed by the State Board of Elections, shall bear the seal of the county clerk, and shall contain the following information: name, residential address, precinct, party affiliation, statement of the reason the person cannot vote in person on election day, statement of where the voter shall be on election day, statement of compliance with the residency requirements for voting in the precinct, and the voter's mailing address for an absentee ballot.

Initially, as is evident, the statute explicitly enumerates multiple items that must be contained in an application for an absentee ballot. None of those explicitly enumerated items is a Social Security number or a telephone number. Moreover, the uncontradicted evidence at trial demonstrated that the State Board of Elections was phasing out the Social Security number field on the application form and did not require a Social Security number or telephone number to print a ballot for mailing. It is thus baffling that the courts below somehow found fault or reason for concern in the fact that Social Security numbers or telephone numbers were not contained in voters' applications.

That is doubly true since the only reason either the Circuit Court or the Court of Appeals could find for declaring the lack of that information meaningful was that Social Security numbers or telephone numbers somehow allowed for verification of a voter's identity. But that reason ignores the other information on the application, far more meaningful, that allow for verification of a voter's identity and render a Social Security number or telephone number thoroughly unnecessary (as recognized by the Legislature when drafting the statute at issue). After all, the voter's name, residential address, and mailing address are all provided. Notably, Mr. Montgomery presented no evidence that he attempted to locate a voter to identify his or her identity and eligibility to vote and could not do so, much less that he could have done so if only the voter's Social Security number or telephone number had been present on the application. As noted above, the uncontradicted evidence at trial demonstrated that even the State Board of Elections believed the Social Security numbers to be unnecessary, as it was phasing them out from the application forms and would allow an application to be printed without inputting the Social Security numbers. The fact that applications were missing Social Security

numbers or telephone numbers is meaningless to the real question at hand: whether statutory violations struck at the heart of the election and exposed it as fraudulent.

Both the Circuit Court and the majority at the Court of Appeals also expressed concern over the fact that 31% of the ballot applications did not state the location where the voter would be on Election Day. But while it is true that some applications omitted that information, it does not follow that the failure to include that information in any way indicated fraud or "destroy[s] any hope that results as tabulated [would be] a fair indication of the sense of the voters." *Upton*, 470 S.W.2d at 825.

Indeed, despite their expressions of concern, Mr. Montgomery, the Circuit Court, and the Court of Appeals all failed to explain how omitting information about the location where a voter would be on Election Day tainted the election in any way. The Court of Appeals simply stated, in a conclusory manner, that "KRS 117.085(2) specifically requires this information because it serves as the basis for exercising the privilege to vote absentee." Of course, this ignores that all applications listed the actual reason that the voter was seeking to vote absentee, which is what actually serves as the basis for exercising the privilege to vote absentee, not the location of the voter on Election Day. Thus, for instance, a majority of the mail-in absentee ballot applications listed disability or illness as the reason the individuals were voting absentee. Presumably, such individuals were at home or in a healthcare facility on Election Day. But the precise location matters not; only that they were ill or disabled such that they could not be at the polls on Election Day. *See* KRS 117.075(1). Other voters' applications listed their jobs as the reason they needed to vote absentee. *See* KRS 117.085(7). As both Larry and Renee Shepherd explained, many workers in Magoffin

County simply do not know where they will be working from one day to the next, and thus are not able to supply further information.

Of course, despite having extra time for discovery during which Mr. Montgomery could have investigated the locations of mail-in absentee voters on Election Day, Mr. Montgomery was unable to produce any evidence of any voter misconduct. *Cf. McClendon v. Hodges*, 272 S.W.3d 188, 190 (Ky. 2008) (finding substantial evidence supporting trial court's determination of fraud where it was "established that numerous persons who voted by absentee ballot were actually present in the count on Election Day"). Simply put, the failure to list the anticipated location of the absentee voter on Election Day was in no way material to the results of the election.

Finally, the Court of Appeals referred to the fact that eight applications out of 1,145 (or less than 0.7% of them) did not list the name of the person who requested the application (as opposed to the name of the voter who was voting), which, the Court of Appeals characterized as a "serious deviation from the statutory procedures regarding applications for absentee ballots."[41] Even setting to the side the infinitesimally small number of applications missing this information, the failure to list the name of the person requesting the application is also nothing more than a technical defect. As noted above, Mr. Montgomery had the opportunity and ability to investigate the qualifications and eligibility of the absentee voters for whom the information was missing. He could not produce any evidence that the voters were ineligible or their votes tainted by fraud.

In short, the real question is not whether each question on each ballot application was wholly answered, but whether the voters who voted absentee did so appropriately. There is absolutely no reason to disenfranchise a voter who was qualified to vote

[41] *See* Appendix A, Court of Appeals' opinion at 14.

absentee, but whose application left out his or her Social Security number; telephone number; anticipated location on Election Day; or the name of the person who requested the application. Mr. Montgomery presented no evidence to tie the absence of such information to any fraud or ineligible voters. That failure doomed his case.

Indeed, case law supports the obvious notion that missing pieces of information on an application of an otherwise eligible absentee voter are no reason at all to set aside an election. In *Skaggs v. Fyffe*, the Court of Appeals was faced with a lawsuit seeking to enjoin an election in Lawrence County to determine whether alcohol could be sold there. 98 S.W.2d 884 (Ky. 1936). The election was to be held only upon the filing in the county court of a petition signed by 25 percent of the legal voters. *Id.* at 885. The statute stated that the petition had to have the signature of the voter, the voter's post office address, and the date on which the voter signed it. *Id.* The challengers in *Skaggs* complained that the petition for an election in Lawrence County was "fatally defective" because the date and post office addresses of a number of signatories were missing. *Id.* at 886.

The Court of Appeals found that the petition in Lawrence County was valid despite the missing information because the provision of the statute requiring such information was "directory" rather than "mandatory." It explained the difference:

> A proceeding not following a mandatory provision of a statute is rendered illegal and void, while an omission to observe or failure to conform to a directory provision is not. In *Varney v. Justice*, 86 Ky. 596, 600, 6 S.W. 457, 459, 9 Ky.Law Rep. 743, the court said: "By the term 'directory' it is meant that the statute gives directions which ought to be followed; but the power given is not so limited by the directions that it cannot be exercised without following the directions given. In other words, if the directions given by the statute to accomplish a given end are violated, but the given end is in fact accomplished,

> without affecting the real merits of the case, then the statute is to be regarded as directory merely.

Skaggs, 98 S.W.2d at 886. The Court of Appeals continued to explain that where a statute provides that "certain acts or things shall be done within a particular time or in a particular manner, but does not declare or indicate that their performance is essential to the validity of the election, they will be regarded as directory if they do not affect the actual merits of the election." *Id.* Further, statutory provisions relating to elections "will, to every reasonable extent, be treated as directory rather than mandatory." *Id.*

With respect to the statutory requirement that the signatories' post office addresses and the date of the signature had to be on the petition, the Court of Appeals explained that the address of the signatory and the date he or she signed were only required "to afford convenience in ascertaining the real or substantial thing, to wit, the qualification" of the signatory. *Skaggs*, 98 S.W.2d at 887. Accordingly, the Court of Appeals found that "the provisions of the statute that the post office address and date of signature of the petitioners shall be stated are interpreted as being directory, although their qualification as voters of the territory involved is, of course, mandatory because jurisdictional." *Id.* at 889.

As explained above, the applications for absentee ballots contained the reason that the applicants were seeking to vote absentee as well as information, such as the voter's residential address, sufficient to generally qualify the applicants as voters in the election. As in *Skaggs*, the "real or substantial" issue was the qualification of the voter and eligibility to vote absentee; the missing information in the applications, at most, "afford[ed] convenience in ascertaining the real or substantial thing." *Skaggs*, 98 S.W.2d at 887. Mr. Montgomery offered no proof on that "real or substantial" issue, but instead

focused his proof solely on the absence of items that possibly could have "afford[ed] convenience in ascertaining the real or substantial" issue. In doing so, he failed to meet his burden of demonstrating that the lack of information in the applications was anywhere near the sort of "flagrant, extensive, and corrupt" statutory violations that would support setting aside the election.

B. The in-house absentee voting process substantially complied with the statutes.

Likewise, Mr. Montgomery failed to demonstrate that any purported "irregularities" in the in-house absentee voting were anything other than, at most, *de minimis* statutory violations that had no actual effect on the election. Indeed, as the Court of Appeals recognized, there was no statutory violation at all with respect to the Board of Elections' holding absentee in-house voting for three days prior to the appointment of a new Republican member of the Board to replace the one who retired right before the inception of that voting. And while the courts below found issue with seven voters having received assistance from either a deputy clerk or a deputy clerk and Democrat election commissioner, there was no evidence whatsoever that these were "flagrant, extensive, and corrupt" statutory violations such that the whole of Magoffin County's election should be set aside.

Initially on this point, while Mr. Montgomery contended, and the Circuit Court concluded, that the Board violated KRS 117.085(1)(h) by holding absentee in-house voting with a Republican member of the Board present, the Court of Appeals rightly rejected that finding. KRS 117.085(1)(h) provides:

> The members of the county board of elections or their designees who provide equal representation of both political parties may serve as precinct election officers,

> . . . . ***If the members of the county board of elections or their designees do not serve as precinct election officers for the absentee voting, the county clerk or deputy county clerks shall supervise the absentee voting.***

(emphasis added). Thus, the statute does not mandate that a county board of elections serve during in-house absentee voting; instead, the county clerk or her staff could supervise the absentee voting.

That alternative allowance was important here given the unexpected resignation by the former Magoffin County Republican Commissioner. Pursuant to KRS 117.085(1)(c), the County Clerk was required to provide in-house absentee voting for at least 12 working days prior to the election. Including Saturdays, 12 working days prior to the November 4, 2014 election was Tuesday, October 21, 2014. The Board of Elections set in-house absentee voting to begin the day prior, Monday, October 20, 2014, as many counties do. However, just three days – and only one business day – prior to the beginning of in-house absentee voting, Mike Prater, the Republican Commissioner, resigned. This left the Board of Elections with the following choice: (i) delay in-house absentee voting until a new Republican Commissioner was appointed, or (ii) proceed with in-house absentee voting supervised by the county clerk and her staff. Only the latter option complied with the statute.

Further, the Republican challenger, Garlena Workman, a supporter of Mr. Montgomery, was present for in-house absentee voting the entire time.[42] It was not until October 22, 2014 that the Chairman of the Republican Executive Committee made his recommendation to the State Board of Elections of five candidates to replace Mr. Prater. The Secretary of State appointed Justin Williams the next day, and Pastor Williams

[42] VR 11:45:36 to 11:45:46 on Feb. 9, 2015.

manned his post the following afternoon. Notably, despite being present for the entirety of the in-house absentee voting and being a supporter of Mr. Montgomery, Ms. Workman never saw anything untoward, or indicative of "fraud," whether prior to or after Pastor Williams' appointment.[43] It was thus thoroughly baffling – and telling of the strength of his overall case – that Mr. Montgomery even attempted to rely on the absence of a Republican Commissioner (who had chosen to resign) from the Board of Elections as evidence of an "irregularity."

Ms. Workman's and Pastor Williams' testimonies also thoroughly refuted the notion that the limited times that Larry Shepherd, a deputy clerk, and Susie Salyer, the Democrat commissioner, assisted voters were anything other than technical violations of a statute, rather than "flagrant" and "excessive" statutory violations striking at the heart of the election and "destroy[ing] any hope" that the results of the election were a fair indication of the sense of the voters. *Upton*, 470 S.W.2d at 825, 827. The Circuit Court found that Larry Shepherd assisted a total of four voters and that Larry Shepherd and Susie Salyer together assisted three more, meaning that this issue concerns a mere seven voters.

Even more important than the fact that this issue relates to an extremely limited number of voters is the fact that there was no evidence that Larry Shepherd and Susie Salyer's assistance impacted the election or was in any way unfair. As noted above, Ms. Workman was present throughout the in-house absentee voting and never saw any indicia of fraud or misconduct. Pastor Williams, the new Republican Commissioner who was dedicated to the cause of opposing vote buying and election fraud, also testified that throughout the in-house absentee voting, he never saw anything remotely unfair about the

[43] VR 11:50:08 to 11:50:39 on Feb. 9, 2015.

process. In other words, two Republicans were consistently present throughout in-house absentee voting, and both affirmatively testified that they never saw any improprieties. Of course, Mr. Montgomery put forth no evidence to contradict the testimony of those two Republicans. For instance, he never presented testimony from any of the seven assisted voters, or presented any other evidence concerning them, to attempt to show that the assistance they received in voting had some material effect on their votes. Simply put, Larry Shepherd's and Susie Salyer's assistance of voters was at most a technical defect. In no way did it strike at the heart of the election. Even the Court of Appeals' majority was compelled to admit as much.[44]

C. The Absentee Ballot Counting Process Substantially Complied with the Statutes.

Nor did the alleged "irregularities" in the absentee ballot counting process have any actual effect on the election. The courts below found that the Board of Elections violated KRS 117.087 by failing to remove the ballots individually, by collectively comparing the signatures on the envelopes with the registration cards rather than having the Clerk do so by herself, and by shuffling the envelopes on a table rather than shuffling them inside the ballot box by shaking it. But despite that the entire process was conducted subject to observation by numerous individuals, there was no evidence that anything inappropriate in the least occurred, and in fact all testimony about the counting of absentee ballots confirmed that the process was honest, fair, and honorable.

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[44] *See* Appendix A, Court of Appeals opinion at 23 ("The irregularities in the conduct of in-house absentee voting were comparatively minor and cannot be shown to have directly affected the outcome of the election.").

Renee Shepherd, Justin Williams, and Susie Salyer all worked together to complete the counting of the absentee ballots prior to the polls closing.[45] Pastor Williams explained that "the integrity of the vote would be better maintained if everyone there had a part in the process."[46] And it is hard to even fathom why the courts below would find that the shuffling of the absentee ballots on the table in view of all present rather than shaking them in an unwieldy and heavy ballot box could possibly have any effect on the election.

Notably, Pastor Williams was actively looking for misconduct, going so far as to ensure that no writing instruments were in the room.[47] Additionally, another candidate on the ballot that day and two representatives of other candidates were in the room observing the count.[48] In fact, the Board rejected 11 absentee votes for various reasons, including two voters who had died between when they voted and Election Day.[49] But there was no evidence of any impropriety, fraud, or unfairness. The members of the Board of Elections, including Pastor Williams, believed the process was honest, fair, and honorable, and that none of the absentee votes should be discarded.[50]

Strangely, the Court of Appeals' majority addresses Pastor Williams' testimony directly in a paragraph of its opinion, but in doing so completely fails to note that Pastor Williams himself believed the entire vote counting process to be fair and honorable.

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[45] Justin Williams, VR 1:27:54 to 1:28:29 on February 9, 2015.

[46] *Id.*

[47] VR 1:31:50 to 1:32:21.

[48] VR 1:26:00 to 1:26:40.

[49] VR 1:36:00 to 1:36:30, 1:39:30 to 1:40:00.

[50] VR 1:40:30 to 1:41:05.

Instead, the Court of Appeals stated, "The irregularities in the absentee vote counting were somewhat ameliorated by the efforts of Republican member Williams."[51] But this statement implies, based on no evidence or testimony, that there were in fact ill effects from the "irregularities" in the vote counting process, and that it was not, as Pastor Williams himself believed and testified, a fair process. Why the Court of Appeals would ignore Pastor Williams' own testimony on the most crucial aspect of the whole matter – the fairness of the process – is befuddling. In any event, the uncontradicted evidence was that the vote counting process, overseen by the Board of Elections, including Pastor Williams, and observed by multiple candidates or candidate representatives, was fair. Any deviations from statutes fall far short of constituting "flagrant, extensive, and corrupt" violations for which an election must be set aside.

D. Administration at the Precincts Substantially Complied with the Statutes.

The Circuit Court also found two violations in the voting at precincts on Election Day, although both it and the Court of Appeals admitted that any irregularities in the Election Day voting were insufficient to establish that they had any significant effect on the outcome of the voting at the precinct. Moreover, the evidence of the purported violations was at best equivocal, and certainly not the sort of "unerring[]" evidence of flagrant and corrupt statutory violations for which an election should be overturned. *Hall v. Martin*, 208 S.W. 417; *see Upton*, 470 S.W.2d at 827.

Specifically, the Circuit Court noted that only one precinct officer assisted a few voters in violation of KRS 117.255(3). However, this finding contradicts the testimony from those present in Flat Fork precinct. Erik Bishop and Samantha Arnett each testified that neither Eric Salyer nor Donna Isaac assisted any voters by themselves. The Circuit

[51] See Appendix A, Court of Appeals Opinion at 23.

Court's finding appears to be based on 14 voters whose Voter Assistance Forms were signed by either Ms. Isaac or Mr. Bishop. However, the election officers were trained that only one election officer needs to sign the Voter Assistance Form. But even if only one election officer assisted those 14 voters, there simply was not evidence of any fraud related to assisting those voters.

The second finding related to precincts was that elections officers in four precincts failed to sign the precinct roster or to list the method some voters' identification was confirmed. These are highly technical violations, not fraud. Kentucky courts have found the failure of an election officer to sign the roster is a technical violation and that a voter should not be disenfranchised due to such an omission by an election official. *See, e.g.*, *Anderson v. Likens*, 47 S.W. 867 (Ky 1898) (a clerk's failure to sign book of ballot did not render votes illegal). Finally, it must be noted that there was enough evidence in the precinct roster to allow Montgomery to contact particular voters and inquire as to whether fraud attended their vote. Yet, as with the absentee voting, he never presented any such evidence.

E. Mr. Montgomery failed to adduce any proof that the "irregularities" had any effect on the election.

As explained above, the supposed irregularities to which Mr. Montgomery pointed at trial, and upon which the Circuit Court and the Court of Appeals rested their decisions, were either not irregularities at all, or were utterly *de minimis*, technical violations of statutes. Certainly, there is no proof whatsoever that they had any actual, much less substantial, effect on the election. And Mr. Montgomery had substantial information that would have allowed him to investigate and put on evidence relating to

any effect that the alleged irregularities had on the election. His failure to put on such evidence is extremely telling.

For instance, Mr. Montgomery knew the identities of the individuals whose applications for absentee ballots he challenged on the grounds that the applications did not contain necessary information. Thus, should he have wanted to investigate where a particular individual who failed to state on his or her absentee ballot where he or she would be on Election Day actually was on Election Day, Mr. Montgomery could have done so. And had he wanted to investigate who requested an absentee ballot for a voter whose application did not state who requested the ballot, Mr. Montgomery could have done so. Perhaps Mr. Montgomery did undertake such investigations and still could not find evidence that an individual was ineligible to vote absentee or at all. Or perhaps he just chose not to undertake the investigation at all. Either way, Mr. Montgomery failed to adduce any proof at trial that any of the supposedly deficient ballot applications led to an ineligible absentee voter voting, or any other evidence of fraud related to the absentee ballot applications.

So too with the voters that Mr. Montgomery alleged received inappropriate assistance in voting in-house absentee. Their identities were known. Should Mr. Montgomery have desired to investigate whether that alleged inappropriate assistance in any way affected the votes of those individuals, he could have done so. But he either did not, or he did not like what he learned enough to bring that information up at trial.

And, with respect to the counting of the mail-in absentee ballots, not only were each of the members of the Board of Elections – including Republican member Justin Williams – present for that counting, but so were multiple other observers. Still, despite

the presence of all of those people, Mr. Montgomery could not put forth a single piece of testimony suggesting that ballot counting process was infected by fraud or error, or that it had any effect on the outcome of the election.

Perhaps recognizing the *de minimis* nature of the technicalities to which he pointed, Mr. Montgomery relied upon Mr. Vastrick, a handwriting "expert," to testify that various persons did not sign their absentee ballots based on a comparison he made to the individual's voter registration cards. But Mr. Vastrick was thoroughly discredited as an expert and even he admitted that he could not say for certain based on his limited comparisons that any person did or did not sign a ballot. Further, Mr. Montgomery was unable to put forth any evidence to support the conclusion that any of the people whose signatures Mr. Vastrick questioned had not actually signed their absentee ballots. Indeed, only two individuals on Mr. Vastrick's list testified in the matter, and both of them confirmed that they had signed their ballot (one explained that he had to use his off-hand to sign the ballot since he broke the hand with which he normally wrote).

And yet, despite the complete lack of any evidence that any of the supposed irregularities had any effect on the election, both courts below found that the election should be set aside. It appears that the majority at the Court of Appeals completely misunderstood the standard to be applied when it found that the election should be set aside. For instance, it stated that "[s]ubstantial compliance may be the saving grace in some cases where the violations do not touch on matters required under the statute."[52] But that formulation turns the standard on its head. After all, no cases state, or even imply, that substantial compliance is unavailable in cases where statutes have been violated, and such a rule would make little sense insofar as a requirement of no statutory

[52] *Id.*

violations would turn the rule into one of ***full and complete*** compliance rather than substantial compliance. Further, the well-established law in this state demonstrates that, in order to overturn an election, it is the burden of the election contestant to show, clearly and convincingly, violations of statutes that are flagrant, extensive, and corrupt, so much so that they destroy any hope that the vote tabulation reflected the voters' wishes. *See Upton*, 470 S.W.2d at 827.

Cases from Kentucky appellate courts amply demonstrate that the technical violations identified by Mr. Montgomery and relied upon by the courts below are insufficient bases for overturning an election. For instance, in *Harmon v. Wilson*, 254 S.W.2d at 694, the Court of Appeals, after noting the general rule "of practically universal application that an election will not be invalidated or voters deprived of their right of suffrage by mere irregularities which do not affect the fairness and equality of the election," listed many types of irregularities that have been held insufficient to invalidate an election or ballots cast therein: "an election conducted by officers not appointed or qualified in the manner directed by the statute"; "an election conducted by less than the required number of election officers"; and "failure to comply with the provisions of KRS 126.270(1-3)" which related to the manner in which "absentee ballots . . . were not handled and counted." *See Steel v. Meek*, 226 S.W.2d 542, 543 (Ky. 1950) (failure of the County Clerk to "follow strictly the procedure outlined in KRS Chapter 126 for the handling of absentee ballots" was insufficient to disenfranchise absentee voters without "bad faith, misconduct or fraud").

The violations here are the types of technical defects that Kentucky courts have long held insufficient to require invalidating an election. That is doubly true since there

is no evidence of bad faith, misconduct or fraud on the part of the Board of Elections, nor is there any evidence that any of the technical defects had any effect on the election.

Sims v. Atwell provides a useful comparison to this case. 556 S.W.2d 929. In that case, the Court of Appeals found no basis to disenfranchise voters on the basis that an unqualified officer had been appointed; that the election officers at the precinct did not take an oath of office; that electioneering was allowed at the doors of the voting room for that precinct; and that one of the election officers was absent from the voting room for most of the days. *Id.* at 932-933. The Court of Appeals also found no fraud where some voters failed to sign the precinct list and where persons who were not residents of the precinct, but were residents of the county and eligible to vote in county-wide elections, voted in the precinct. *Id.* at 935-936. By contrast the court in *Sims* did find fraud when voters who neither requested assistance in voting nor signed voter assistance forms were accompanied into voting booths by one of two individuals, challenged when they voted for the "wrong" candidate, and received money after leaving the polling place. 556 S.W.2d at 934. The technical defects at issue here are all of the type of violations about which the *Sims* court found no basis to disenfranchise voters and no fraud. They are also far from the type of fraudulent voting that so troubled the *Sims* court.[53]

It is not just the cases in which Kentucky courts have found the evidence insufficient to set aside an election that support the conclusion that Montgomery's evidence was insufficient. Cases in which Kentucky courts have set aside the results of

[53] Finally, it should be noted that in *Sims*, notwithstanding that strong evidence of fraud and intimidation, the court ultimately determined that the contestant had not introduced sufficient evidence to establish that the contestee did not win the election, and accordingly directed dismissal of the contestant's complaint. 556 S.W.2d at 937. This was because the contestant failed to put forth evidence sufficient to demonstrate that enough illegal votes had been cast for his opponent to change the result of the election if the illegal votes were disregarded. *Id.* As explained below, Montgomery's evidence suffered the same deficiency.

the election provide a good comparison of the sort of flagrant, extensive, and corrupt violations that are required to throw out an election. For instance, in *Arnett v. Hensley*, an election contest involving the county clerk race, the court (which noted that it was not undertaking to recite all statutory violation but only certain exemplary "glaring defects") related a set of extraordinarily suspect conditions relating to the mail-in application ballots. 425 S.W.2d at 550-552. Among other things, while the statutes in effect required the board of elections to hold a meeting regarding such mail-in ballots nineteen days before the election that was open to candidates and the media, the board of elections instead met four or five days before the election without invitation to the candidates or the media. *Id.* at 550. The board of elections chose no secretary and kept no records of its meetings. *Id.* at 551. The county clerk and the board of elections seriously mishandled the ballot boxes, leaving off required locks; not ensuring that three separate members of the board of elections each had a key, all of which were needed to open a ballot box; locking one ballot box with a single key; and counting mail-in ballots even though more than half of them failed to contain the name of the voter on the outer envelope. *Id.* at 551-552. Notably, the second ballot box that contained just one lock (notwithstanding that the statute required three locks with the keys going to different individuals) had 76 ballots that were picked up from the post office shortly before the polls closed, of which all but one (incidentally the last one taken out of the box) were votes for the Democratic candidates. *Id.* at 552. Further, one individual, whose work supervisor was a brother of the incumbent Democrat county clerk that was standing for election, notarized 166 applications for absentee ballots at the office of the sheriff, and a substantial number of the absentee ballots were mailed in envelopes with the return

address of the sheriff. *Id.* at 552. In short, there was a strong showing in *Arnett* that the various defects were not simply irregularities, but were a part of a substantial fraudulent scheme.[54]

That stands in stark contrast to Montgomery's evidence concerning irregularities with absentee balloting. Simply put, not a single technical defect identified by Montgomery at the trial of this matter was ever shown to have any connection to fraud or bribery, nor was there any showing that the board of elections wholly disregarded entire statutes. The in-house absentee process was at all times attended by not just by members of the clerk's office and the board of elections, but also a Republican challenger, Garlena Workman, who was a supporter of Montgomery but never saw anything she regarded as fraudulent occurring. Justin Williams testified similarly. And Justin Williams was also present for the entirety of the mail-in absentee ballot counting, along with multiple representatives of other candidates on the ballot that day. Notwithstanding the presence of numerous individuals for all aspects of the absentee balloting process, including Republican supporters of Montgomery, Montgomery was unable to provide any evidence that the absentee balloting process, even if suffering from limited technical defects, was poisoned by fraud, intimidation or bribery.

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[54] Other cases are similar. *See also Hale v. Goble*, 356 S.W.2d 33 (Ky. 1961) (setting aside election where board of elections failed to count ballots on election day, began counting them the following Saturday, adjourned after opening the outer envelope until the following Monday, then counted all ballots even though 111 votes were challenged, and denied demands of challengers to inspect envelopes and affidavits); *Ragan v. Burnett*, 306 S.W.2d 281, 282-283 (Ky. 1957) (where clerk was supposed to send absentee voters ballots from precinct ballot books and mark the stubs with the words "Absent Voter," clerk instead had separate books of ballots printed to be used for absentee voters and clerk made no notations on stubs of precinct book, leading court to conclude that there was "almost total disregard of all the requisites of a particular statute"); *Warren v. Rayburn*, 267 S.W.2d 720 (Ky. 1954) (county clerk had "practically exclusive conduct of absentee balloting," kept returned absentee ballots in a pasteboard box in a publicly accessible area rather than in a locked ballot box, reviewed the absentee ballots by himself prior to election day, sent absentee ballots to voters at the request of a candidate, failed to provide outer envelopes for all ballots, and failed to stamp date and time that ballots were received).

Indeed, in finding that the election should be overturned due to the conduct of the Board of Elections despite the complete lack of any evidence that any of the supposed "irregularities" had any improper effect on the election at all, much less such an effect that it destroyed any hope that the vote as tabulated reflected the will of the voters, it appears that the Court of Appeals' majority was concerned with the history of Magoffin County as much as the actual evidence in this case. Specifically, the Court of Appeals took time to point out the "history" of election "misconduct" in Magoffin County,[55] as if it is legally permissible or justifiable to cure such "history" by overturning an otherwise valid election today based solely on what amount to minor statutory deviations for which not a scintilla of evidence showing an effect on the election exists. The dissent's response to the majority's irrelevant invocation of Magoffin County's "history" sums up the issue well:

> Contrary to the stated law, this election has been voided based on speculation and suspicions. Perhaps, the seeds of these suspicions are planted from what the majority considers a history of election misconduct in Magoffin County. I do not attempt to contradict the majority's historical account. Regardless of the sins of past candidates and election officials, we are required to decide the fate of this election based on the facts presented, or more importantly, those not presented.[56]

III. MONTGOMERY FAILED TO PROVE THAT THE ELECTION WAS AFFECTED IN ANY WAY BY THE IRREGULARITIES

Even setting to the side that the evidence at trial did not support the finding that the election was tainted by "irregularities" such that the election should be set aside and Magoffin County and its voters should be forced to undertake the cost, delay, and

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[55] *Id.* at 20.

[56] *Id.*

difficulty of an entirely new election, Mr. Montgomery also failed to meet his burden for another reason: he was required to demonstrate that any allegedly improper votes were cast in Dr. Hardin's favor, rather than his own, or else to demonstrate that doing so was impossible. Mr. Montgomery did neither. His failure to meet his burden rendered his case insufficient.

In an action claiming that particular votes were tainted or otherwise ineligible to be counted for some reason, it is "indispensably necessary" that the contestant provide proof of how the voters voted. *See Napier v. Noplis*, 318 S.W.2d 875, 879 (Ky. 1958) (quoting *Hogg v. Caudill*, 71 S.W.2d 1020, 1021 (Ky. 1934)). In *Hogg v. Caudill*, this State's highest Court confronted a case in which votes were allowed to be cast after the then-statutory 4:00 p.m. cut-off for voting. 71 S.W.2d at 1021. The Court noted that "the stubs of the poll books disclosed the names of the voters" who voted after 4:00 p.m. and thus "it could have been ascertained from the voters for whom the ballots were cast." *Id.* The Court explained, "Those cast after 4 o'clock being illegal, it was proper to compel the voters who voted after 4 o'clock to testify for whom they voted." *Id.* The Court continued, "This being so, in order to entitle Hogg to have the votes cast for the recipient deducted from his total vote, it was ***indispensably necessary*** to set out in his pleading the names of the voters who voted after 4 o'clock and for whom they were cast, and support the allegations, if need be, by the testimony of the voters who voted after 4 o'clock." *Id.* (emphasis added). *Hogg* thus makes clear that when individual votes are challenged and are identifiable, the contestant must show for whom those individuals voted.

In *Napier*, this State's highest Court applied that principle again. In that case, the contestant claimed that certain voters were nonresidents and thus had voted illegally. The

Court held that the contestant failed to meet his burden because, although "the names of the alleged illegal nonresident voters were listed, . . . the contestant failed to prove, as he could have done, how they voted within the rule summarized in *Hogg v. Caudill*." 318 S.W.2d at 879.

Here, of course, much of the evidence Mr. Montgomery presented and relied upon related to the votes of particular voters. For instance, he claimed that a number of absentee ballots were missing particular information that was required to be on the application. He could have called the individuals with the missing information as witnesses and asked for whom they voted; he did not. Mr. Montgomery also complained that certain voters were inappropriately assisted in voting. Again, he could have called those voters as witnesses and asked them about their votes; he did not. It was Mr. Montgomery's burden to show that the supposed irregularities affected the election; he did not.

CONCLUSION

Mr. Montgomery tried a case he failed to plead, in violation of KRS 120.155, and it was upon those non-pleaded grounds, relating to the absentee balloting process, that the Circuit Court and the Court of Appeals wrongly concluded that the election should be set aside. Moreover, Mr. Montgomery failed to show that any of the alleged "irregularities" in the absentee voting process had any effect on the election. Indeed, the uncontradicted testimony in the case was that the process was fair throughout. For the foregoing reasons, the Circuit Court's Judgment should be reversed.

Counsel for Magoffin County Board of Elections